

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

July 6, 2009

Augustus H. Evans
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

**RE: State of Delaware v. Augustus H. Evans
Criminal Action No. 0609011528A**

Dear Mr. Evans:

This is the Court's decision denying the Defendant's Motion for Postconviction Relief filed on June 8, 2009.

Mr. Evans (sometimes referred to as "Defendant") was convicted of crimes involving two separate incidents occurring in less than 24 hours. He was convicted of crimes involving a shooting in the town of Seaford. The following day his conduct included pulling a pistol on a Laurel police officer in an attempt to escape or get away from the officer. Interestingly, the Laurel police officer was not aware of the shooting incident the night before as he was investigating a minor offense which took place minutes before the confrontation with the Defendant. Mr. Evans apparently thought the officer knew more and pulled the gun to try to get away.

Mr. Evans exercised his constitutional right to represent himself. In January, 2007, the Public Defender was relieved from representing Mr. Evans. A multitude of motions were filed by the Defendant. His request to sever the two counts of possession of a deadly weapon by a person prohibited was granted. The Defendant was also granted funds to hire private investigators. Also, much effort was expended to allow the Defendant to be brought into the Courthouse in order to allow him to view DVD's and/or tapes since he did not have access to the necessary equipment at the prison. The Court also made a request that Mr. Evans receive adequate access to the prison law library. All of this was done to accommodate Mr. Evans.

Other motions concerning "more" discovery, motions to suppress, and motions to sever the Seaford and Laurel charges, and a motion to dismiss, were denied.

The docket reveals much activity by the Defendant and it also reveals the efforts of this Court to protect the interests of a very demanding *pro se* defendant. It is an understatement to say Mr. Evans was zealous in his own defense.

Ultimately, as the trial grew nearer, his public defender was appointed as "standby" counsel to assist him with the jury instructions and to be with him at trial to help him with questions. It was clear that the Defendant was still representing himself.

Following trial, the Defendant was convicted of assault in the second degree, aggravated menacing, resisting arrest with force or violence, and two counts of possession of a firearm during the commission of a felony. As an habitual offender, he received twelve (12) years for the assault and sixty (60) years for the two firearms convictions. He received probation on the remaining charges.

In the Supreme Court, he likewise chose to represent himself. He raised five issues: (1) the validity of his indictment; (2) insufficient evidence as to the Laurel charges; (3) that he did not waive his *Miranda* rights as to the Seaford charge; (4) that the photo lineup in the Seaford charges was unduly suggestive; and, (5) ineffective assistance of standby counsel.

The Supreme Court affirmed his conviction but noted the claim as to standby counsel was premature. *Evans v. State*, 968 A.2d 491, 2009 WL 367728, at *1 (Del. Feb. 13, 2009) (TABLE).

In the present Motion for Postconviction Relief, the Defendant makes the following claims:

- Ground One: No judicial authority for Defendant to be taken to the police station for interrogation.
- Ground Two: An unreliable photo line-up.
- Ground Three: A "veracity challenge" to the arrest warrant.
- Ground Four: Ineffective assistance of counsel.
- Ground Five: The absence of counsel at "critical stages".

The Defendant acknowledges that he has raised the first three grounds in this Court and/or on appeal, but he wants to reargue same because they "were misapprehended and/or not entertained by the justices".

Mr. Evans is a very intelligent person who has wasted his talents and ability. He is persistent and never wants to let go of an issue. Nevertheless, issues raised and adjudicated in this Court and the Supreme Court will not be reargued. Rule 61 bars previously adjudicated issues and therefore Grounds One, Two and Three are procedurally barred.

Those issues decided by the Superior Court but that Defendant chose not to appeal are also procedurally barred as Defendant has not established any reason or cause for not raising the issues of illegal detention and "veracity challenges" in the Supreme Court. Superior Court Criminal Rule 61(i)(3).

Nor can the Defendant establish any prejudice under Rule 61(i)(3). The veracity challenge is meritless because the Defendant chooses to argue that there was no probable cause because the girl he was with, who gave a statement incriminating him, subsequently recanted. The recantation has no bearing on his argument because (1) she recanted long after the Defendant's arrest; and, (2) her testimony was only corroborative of the police officer's testimony. The officer testified the Defendant pulled a gun on him and then took off. He chased the Defendant down and arrested him.

The argument that there was no "judicial authority" for the Defendant to be questioned about the Seaford incident following his arrest in Laurel is also meritless. The circumstances of that statement were that he was already seized and in custody because of the Laurel arrest. No judicial authority was necessary for the Defendant to be *Mirandized* and questioned about the Seaford incident.

In Ground Four, he argues ineffective assistance of counsel. This is an interesting position since he represented himself. His public defender was appointed as standby counsel for the purpose of answering his legal questions. He has not established that standby counsel was ineffective in her performance. He cannot blame her for his failure to prevail in his motions. He wants it both ways: he wants to represent himself, and then blame her for his failure. He failed because of the simple fact that he was in custody already when he was *Mirandized* and confessed to the Seaford incident. Simply put, his standby attorney did not contribute to his losing the motion. The facts did.

He also alleges that somehow his standby attorney was ineffective in not addressing his unsuccessful motion to dismiss the Laurel charges because a witness recanted. This argument ignores the simple fact that the State had another witness - the police officer who was on the wrong end of the gun he had. This argument has no factual basis.

Finally, as to this issue, he had no constitutional right to standby counsel. *Bass v. State*, 760 A.2d 162 (Del. 2000). Therefore, since he has no right to standby counsel, he cannot establish an ineffectiveness of counsel claim. *United States v. Morrison*, 153 F.3d 34,55 (2d Cir. 1998). The record reflects that standby counsel was just that, and the Defendant retained control of his own defense.

In his final claim, he alleges his attorney was not with him at all critical stages of the proceedings. He keeps forgetting that he chose to represent himself. The Public Defender was appointed to help him, not to represent him. (Standby counsel was appointed on June 22, 2007. It was known then that she was not available on his first day of trial; therefore, jury selection and the trial was moved from July 9, 2007 to July 10, 2007). She was with him throughout the trial and on occasion he consulted with her. He has not established that he was entitled to have standby counsel at the Motion to Dismiss, (Motion to Dismiss because of a recanting witness denied on merits), nor at Final Case Review, whereupon even with counsel representing him, he would still be the sole person to accept or reject the plea. If he is not constitutionally entitled to standby counsel, he cannot be entitled to standby counsel at critical stages. *Bass v. State*, 760 A.2d 162 (Del. 2000).

There was no prejudice as to the Motion to Dismiss arising from the recanting witness, because under the facts of the case, the Motion bordered on the frivolous. No attorney could have transformed it into a meritorious motion. Nor can he establish prejudice in not having his attorney with him at final case review because he had made it clear he wanted a trial. When she became standby counsel, everyone knew she would not be present at final case review. He has not established he was worse off because she was not present.

As an aside I attach a copy of the docket printout for this case. It evidences the efforts of the Court to accommodate his many, many requests. He received funds for private investigators; his Motion for a Mental Exam was granted; special arrangements were made for him to review discovery in a courtroom; assistance was given in getting subpoenas out; special access to the law library was sought by the Court; etc. In other words, the Court attempted to protect his rights throughout the process. The simple fact remains that the evidence was overwhelming. Regardless of the spin he places on it, he received a very fair trial.

The Defendant's Motion for Postconviction Relief is denied.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

baj

Enclosure

cc: Prothonotary
Department of Justice